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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CONSTANCIA N. LOPEZ,

Plaintiff,

No. C 07-2649 PJH

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security Administration,

Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES**

Plaintiff Constancia Lopez applies for an award of attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412(d), for the time that her attorney, Harvey P. Sackett ("Sackett"), expended on appeal before this court of the Commissioner's final decision denying plaintiff's disability insurance benefits under Title II of the Social Security Act. Having carefully reviewed the parties' papers and considered their arguments and the relevant legal authority, the court hereby DENIES plaintiff's motion, for the following reasons.

BACKGROUND

On August 12, 2008, the court granted in part and denied in part both Lopez's and the Commissioner's respective motions for summary judgment, and remanded the matter for limited further proceedings before the administrative law judge ("ALJ"). There were three main issues (which included sub-issues) before the court on appeal, and the court granted the Commissioner's motion and denied Lopez's motion as to two of the three

1 issues. As for the third issue, whether the ALJ failed to consider Lopez's non-severe
2 mental impairments during his Step Four analysis, the court found that the ALJ erred when
3 he failed to articulate or explain his consideration of Lopez's non-severe depression.

4 Specifically, the court stated in the August 12, 2008 order:

5 There is evidence in the record that suggests the ALJ may have
6 considered Lopez's non-severe mental impairments at Step Four of his
7 analysis. The record shows that at Step Four, the ALJ proffered a
8 hypothetical to the VE that took into account Lopez's non-severe depression.
9 Specifically, the ALJ asked the VE whether someone with a mild mental RFC
10 for activities of daily living, mild for social function, mild for concentration,
11 persistence, and pace, with no episodes of decompensation could perform
12 Lopez's relevant past work. A.T. 310-11. Accordingly, given this
13 hypothetical, the ALJ may have accorded some consideration to the limiting
14 effects of Lopez's non-severe depression in his RFC determination.

15 However, the ALJ failed to *articulate* this consideration in his decision.
16 At Step Four, the ALJ had a duty to set forth a detailed analysis of the
17 reasoning that formed the basis of his conclusions. See SSR 98-6p
18 (describing the extensive narrative discussion requirements of the ALJ).
19 Accordingly, the ALJ was required to make specific findings on the record at
20 each phase of the Step Four analysis. See *Pinto v. Massanari*, 249 F.3d 840,
21 847 (9th Cir. 2001) (finding error where "ALJ, although noting [claimant's]
22 limitation in both his findings of fact and hypothetical to the vocational expert,
23 failed to *explain* how this limitation related to his finding that [the claimant]
24 could perform her past relevant work") (emphasis added).

25 In *Pinto*, the Ninth Circuit faulted the ALJ for the same type of error.
26 *Id.* In that case, the Ninth Circuit was concerned with the ALJ's failure to
27 explain how the claimant's illiteracy factored into his analysis regarding her
28 ability to perform her past relevant work. *Id.* at 846. The *Pinto* court noted
that although the ALJ likely considered the claimant's limitation in a
hypothetical to the VE, the ALJ erred by failing to explain how this limitation
related to his finding that the claimant could perform her relevant past work.
Id. at 847. The Ninth Circuit remanded the case because, among other
reasons, the court found it difficult to review the ALJ's decision without a
sufficient explanation for his reasoning. *Id.*

Like *Pinto*, in this case, the ALJ's decision does not properly explain
his consideration, if any, of Lopez's non-severe mental impairment at Step
Four. In fact, the ALJ fails to mention at all Lopez's mental impairment in his
decision on the issue of her RFC. Moreover, he also fails to mention or
discuss the effect of Lopez's non-severe impairments in combination with,
and upon, her severe impairments. Accordingly, remand is necessary so that
the ALJ may consider Lopez's non-severe mental impairments in his RFC
assessment if he did not do so previously; or, if he did, so that he may
articulate its impact on his ultimate RFC finding. See *id.*; see also *Carmickle*
v. Comm'r, Soc. Sec. Admin., No. 05-36128, 2008 WL 2841163, at *7 (9th
Cir. July 24, 2008).

Order at 9-10.

1 In remanding the case to the ALJ, the court was, however, very clear that it found
2 “the ALJ’s decision to have been substantially correct,” that the case was remanded to the
3 ALJ for the limited purpose of “clarify[ing] the impact of Lopez’s non-severe impairments on
4 [the] RFC determination at Step Four,” and that “[i]n all other respects,” the court was
5 granting the Commissioner’s motion and denying Lopez’s motion. Order at 19.

6 **DISCUSSION**

7 **A. Legal Standard**

8 Under the EAJA, an applicant for disability benefits becomes the prevailing party
9 when the denial of benefits is reversed and remanded. *Gutierrez v. Barnhart*, 274 F.3d
10 1255, 1257 (9th Cir. 2001) (citing *Shalala v. Schaefer*, 509 U.S. 292, 300-02 (1993)). A
11 prevailing party may recover attorneys’ fees and costs *unless the court finds the*
12 *government’s position was substantially justified* or that special circumstances exist which
13 would render an award of fees and costs unjust. 28 U.S.C. § 2412(d)(1)(A) (emphasis
14 added). The government has the burden to show that its position was substantially justified
15 or that special circumstances existed. *Gutierrez*, 274 F.3d at 1258.

16 **B. Motion for Attorney’s Fees**

17 Lopez’s counsel, Harvey Sackett, requests a total of \$8,679.45 in attorney’s fees
18 and costs. That represents \$8,003.73 in fees; \$296.80 for 2.8 hours of paralegal work at a
19 rate of \$106.00 per hour; and \$378.92 in costs. As for the attorney’s fees, Sackett asserts
20 the fees are based on 43.3 hours of work, including time preparing the motion for fees and
21 the reply. He requests compensation for 32.95 hours at the 2007 rate of \$176.62 per hour,
22 and for 10.35 hours at the 2008 rate of \$182.35 per hour. The Commissioner opposes the
23 motion, arguing first that fees are inappropriate since its position was substantially justified;
24 and second, that the fees requested are unreasonable.

25 The court first considers whether the Commissioner’s position was substantially
26 justified.

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1 **A. Substantial Justification**

2 “Substantially justified’ means ‘justified in substance or in the main’ - that is, justified
3 to a degree that could satisfy a reasonable person.” *Gutierrez*, 274 F.3d at 1258 (quoting
4 *Pierce v. Underwood*, 487 U.S. 552, 563 (1988)). This standard is met when "reasonable
5 people could differ as to the appropriateness of the contested action." *Pierce*, 487 U.S. at
6 564. A substantially justified position must have a basis in both law and fact. *Gutierrez*,
7 274 F.3d at 1258 (citing *Flores*, 49 F.3d at 569 (“[i]n this circuit, we apply a reasonableness
8 standard in determining whether the government’s position was substantially justified for
9 purposes of the EAJA”).

10 In her opening motion, Lopez argues that the Commissioner’s position on appeal
11 defending the ALJ’s decision on the remanded issue was not substantially justified because
12 the ALJ’s decision had no reasonable basis in law. She also asserts that this court held
13 that the ALJ’s decision conflicted both with Ninth Circuit precedent and with agency policy.

14 In opposition, the Commissioner points out that the court disagreed with all but one
15 of the multiple issues and sub-issues raised by Lopez in her summary judgment motion.
16 As for the remanded issue, the Commissioner argues that the court’s decision itself
17 demonstrates that his decision to defend on the issue was substantially justified. He notes
18 that although the court ultimately remanded because the ALJ did not articulate his
19 consideration of Lopez’s non-severe depression, it nevertheless acknowledged that there
20 was “evidence in the record that suggests that the ALJ may have *considered* them,”
21 specifically in the form of his hypothetical to the vocational expert. The Commissioner
22 asserts that this demonstrates that his position was reasonable in fact.

23 The Commissioner further argues that his position was also reasonable in law,
24 reiterating the arguments he made in his summary judgment brief and opposition pursuant
25 to Social Security Ruling (“SSR”) 96-8p and the Ninth Circuit’s decision in *Hoopai v. Astrue*,
26 499 F.3d 1071 (9th Cir. 2007).

27 In reply, citing to *Flores v. Shalala*, 49 F.3d 562 (9th Cir. 1995), Lopez implies that
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1 the fact that she “won” on only one issue does not make the Commissioner’s position
2 substantially justified.¹

3 Lopez is correct that she need not prevail on every issue in order to receive fees
4 under the EAJA. However, the court finds that the Commissioner’s position in its summary
5 judgment motion and opposition as to the issue upon which Lopez prevailed was
6 reasonable both in law and fact, and thus substantially justified, precluding an award of
7 fees. See *Flores*, 49 F.3d at 569 (inquiry is whether Commissioner’s position with respect
8 to issue on which court based its remand was “substantially justified”). First, based on the
9 court’s discussion of the record and the evidence in its August 12, 2008 order, the
10 Commissioner’s position was reasonable in fact.

11 The court also finds that the Commissioner’s position was reasonable in law. It first
12 notes that contrary to Lopez’s assertion otherwise, in its August 12, 2008 order, the court
13 did *not* hold that the ALJ’s decision was contrary to agency policy. Second, even though
14 the court was persuaded that this case was similar to the *Pinto* case, 249 F.3d at 847, thus
15 requiring remand for additional findings, the Commissioner’s argument that this case was
16 more akin to *Hoopai*, 499 F.3d at 1075, and that the ALJ therefore was not required to
17 make specific RFC findings regarding Lopez’s non-severe depression, was reasonable.
18 See *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002) (concluding that
19 Commissioner’s position regarding ALJ’s characterization of claimant’s testimony at step
20 four was “substantially justified” even though district court reversed and remanded issue).

21 **B. Reasonableness of Fees**

22 Because the court finds that the Commissioner’s position was substantially justified,
23 it need not reach the individual objections to Sackett’s fee request.

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26 ¹Lopez also cites to two other unpublished district court decisions by other judges on
27 this court in support of her argument that it was unnecessary that she prevail on all issues.
28 The court finds those decisions unhelpful in assessing whether the Commissioner’s position
was substantially justified under controlling law.

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CONCLUSION

Because the Commissioner's litigation position was substantially justified, Lopez's motion for attorneys fees pursuant to the EAJA is DENIED.

IT IS SO ORDERED.

Dated: May 15, 2009



PHYLLIS J. HAMILTON
United States District Judge